No. 83-660

In The

Supreme Court of the United States

October Term 1983

WILLIAM KEASLER,

Petitioner,

vs.

FRANK GRANAT, JR.,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

OLWELL, BOYLE & HATTRUP
By: *HENRY LEE OLWELL
CLINTON H. HATTRUP
RODNEY T. HARMON

**Counsel of Record for Respondent*

Office and P. O. Address:

707 Vance Building
Seattle, WA 98101

(206) 622-5730

CRICKLE PRINTING CO., 2111 Douglas St., Omaha 68102

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

TABLE OF AUTHORITIES—Continued

No. 83-660

In The
Supreme Court of the United States
October Term 1983

WILLIAM KEASLER,

Petitioner,

vs.

FRANK GRANAT, JR.,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

COUNTER-STATEMENT OF THE CASE

The Respondent, Frank Granat, Jr., is the owner of submerged real property at 2201 Fairview Avenue East, Seattle, Washington. The Petitioner, William Keasler, owned a houseboat and moored it on Granat's property at moorage site No. 2. Keasler was Granat's month-to-month tenant, paying $195.00 per month for rental of the moorage site.

Granat sought removal of Keasler's houseboat in order to replace it with his own houseboat. Mr. Granat owns several other houseboats at the moorage.

Mr. Keasler's right to remain at the moorage was based upon nothing more than a month-to-month tenancy. Under Chapter 59.12, Revised Code of Washington, a month-to-month tenancy can be terminated by a landlord upon twenty days' notice. Mr. Keasler did not purchase moorage for his houseboat, as Mr. Granat had. Mr. Keasler did not negotiate a long-term lease, either at Mr. Granat's moorage or at any other moorage where he might have moved his houseboat.

Mr. Keasler defended against Granat's unlawful detainer action by raising as an affirmative defense Seattle Ordinance 109280, as amended by Ordinance 109630. The ordinance serves two functions. First, it enacts a rent control scheme for the month-to-month rental of houseboat moorage sites in Seattle. Second, it limits the circumstances under which a houseboat may be evicted.

The Washington Supreme Court used this case as an opportunity, for the second time, to strike down the eviction control provisions of the ordinance as unconstitutional under the Washington State Constitution and the United States Constitution.

In his Petition for Review, Keasler correctly states that shoreline management legislation was enacted by the U. S. Congress, the Washington State Legislature, and the Seattle City Council. It is, however, misleading for Keasler to suggest that no other moorage sites have been developed in the City of Seattle. In fact, they have been developed and have been offered for sale. Mr. Keasler has not purchased one.

Even if a houseboat owner is unwilling to purchase houseboat moorage in the City of Seattle, there is nothing

to prevent him from seeking moorage outside the Seattle city limits or from removing the houseboat from its float and placing it on a foundation on land. Relocating the houseboat does not affect its intrinsic value.

Keasler states in his petition that the ordinance is an essential element of the City's Shoreline Master Program. The characterization is untrue and misleading. The ordinance controls houseboat moorage rent and attempts to give houseboat owners a perpetual lease. It was passed well after the adoption of the Shoreline Program. In fact, the Shoreline Master Program permits Granat to place his own houseboat on the site previously occupied by Keasler, as long as certain height and bulk restrictions are met.

Following the Washington Supreme Court's issuance of its mandate, the Keasler houseboat was evicted. Mr. Keasler sold the houseboat for over six times his purchase price. The new owner of the houseboat subsequently towed it to moorage outside the city limits.

REASONS FOR DENYING PETITION

The Petition seeks to present two questions for review. The first question is whether the Seattle Houseboat Ordinance is unconstitutional. That issue has been resolved upon an independent state constitutional ground. The second issue is whether the Washington Constitution violates the due process clause of the United States Constitution. That issue was never raised below. Further-

more, its consideration by this court is precluded by the independent state ground doctrine.

At the end of its opinion, the Washington Supreme Court succinctly stated its holding on the constitutional issue:

> We hold section 3 of Seattle ordinance 109280 unconstitutional as it deprives moorage landlords of property without just compensation, thus violating the Fifth Amendment to the United States Constitution and article 1, section 16 of the Washington State Constitution.

Article 1, Section 16 of the Washington State Constitution provides:

> No private property shall be taken or damaged for public or private use without just compensation having first been made.

Thus, the Washington court based its holding on both the United States and Washington Constitutions.

Even if the U.S. Supreme Court were to disagree with the Washington court's interpretation of the United States Constitution, it must defer to the Washington court in its interpretation of the Washington Constitution.

This court stated the independent state ground doctrine in *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945):

> This court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. [Citations omitted]. The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and Federal judicial systems and in the limitations of our own jurisdic-

> tion. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge Federal rights. And our power is to correct wrong judgment, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of Federal laws, our review would amount to nothing more than an advisory opinion.

See also *Department of Motor Vehicles v. Rios*, 410 U.S. 425 (1973).

> This court has held:
>
> a state is free as a matter of its own law to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards.
>
> *Oregon v. Hass*, 420 U.S. 714, 719 (1975).

Likewise, when a city exercises the police power, the state supreme court should be free to impose greater restrictions on the use of that power than the U.S. Supreme Court holds to be necessary upon federal constitutional standards.

The Washington Supreme Court has decided the first question presented by Petitioner upon an independent state constitutional ground, precluding review by the U.S. Supreme Court.

The second question presented by Mr. Keasler was never raised before the Washington Supreme Court. Under Washington appellate procedure, an appellant must make assignments of error and set forth the issues he wishes the court to consider with respect to those assignments. Washington Rule of Appellate Procedure 10.3.

The due process issue does not appear in Keasler's appellate brief.

At page 9, line 4 of his Petition Keasler incorrectly states that *Keasler* challenged the constitutionality of the ordinance. On the contrary, it was Granat who challenged the ordinance. Keasler defended the constitutionality of the ordinance. The reference at page 9, line 4 to "Petitioner" is apparently a typographical error.

At pages 9-10 of his Petition, Keasler states that he raised the issue in his Motion for Reconsideration before the Washington Supreme Court quoting a portion of that motion. There are two responses to this argument. First, Keasler could not ask the Washington Supreme Court to reconsider what it did not consider in the first place. Second, Keasler argued in his Motion for Reconsideration that "an eviction totally and irrevocably deprives appellant Keasler of his property *without just compensation*" [emphasis added]. See Petition for Writ of Certiorari, pp. 9-10.

In his Motion for Reconsideration, Keasler raised the issue of the taking of Keasler's property without just compensation. The question he presents for review in his Petition for a Writ of Certiorari is different. Here he raises the question of a possible violation of the due process clauses of the Fifth and Fourteenth Amendments of the U. S. Constitution. These are two entirely different grounds.

Keasler relies upon 28 U. S. C. § 1257(3) as a jurisdictional basis. That statute provides for review by the United States Supreme Court by Writ of Certiorari of "final judgments or decrees rendered by the highest court

of a state in which a decision could be had . . . where the validity of the State statute is drawn in question on the ground of it being repugnant to the constitution . . . of the United States. . . ." The Washington Supreme Court did not render a final judgment on the issue of whether Keasler's right to due process was violated because it was never raised. Therefore, there is no jurisdiction under 28 U. S. C. § 1257(3).

Keasler's due process issue can be viewed from another perspective. Keasler's defense in the unlawful detainer action was based upon the city ordinance. Keasler did not raise as an affirmative defense the due process clause of the constitution. As in Federal Rule of Civil Procedure 8, the Washington civil rules require that affirmative defenses be set forth affirmatively. Civil Rule 8(c) provides:

> In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense.

By failing to plead the due process clause as a defense before the trial court, Keasler lost the opportunity to raise it subsequently. As noted above, he attempts to raise the issue for the first time before this court.

Turning to the merits of his argument, it is apparent that Keasler, in effect, argues that the due process clause of the United States Constitution required the Washington court to uphold the city ordinance. Not only is that

position a novel one, but its logical corollary would require the City to enact the ordinance in the first place. That is not the function of the due process clause.

As with the other provisions of the Bill of Rights, the due process clause is designed to protect individual rights from certain state actions. There is nothing in the due process clause, or in the cases interpreting it, which would require the City of Seattle to enact legislation granting houseboat owners who are on month-to-month tenancies the right to remain indefinitely at their moorages. Furthermore, it is absurd to suggest that the federal constitution requires a state to enact legislation which violates the state's constitution.

The root of this controversy is Mr. Keasler's unwillingness to face up to the fact that he got what he paid for, a month-to-month tenancy. No one guaranteed him other moorage in Seattle when he purchased the houseboat. He may have assumed that he would always be able to find affordable, alternative houseboat moorage in Seattle. However, unless he paid for the right to secure moorage, he was not entitled to assume that he had it. When he purchased his houseboat, he should have figured into his purchase price the fact that he had only month-to-month tenancy at Granat's moorage with no guarantee from anyone that alternate moorage would be available to him if he were evicted.

In Keasler's discussion of the cause of his claimed loss of the value of his houseboat, he admits that, even under his own theory, Mr. Granat is not responsible for that claimed loss. At page 16 of his Petition, Keasler states:

> In fact, it may be fair to say that the cause is not the Respondent moorage owner's action either. The reason why Petitioner [Keasler] suffers a reduction of the value of his floating home to scrap value is that shoreline management legislation has deprived him of any place else to move the floating home if it is evicted from a moorage site.

The City has determined that it will place restrictions on the expansion of floating home moorage sites. It has not prohibited that expansion, but it has placed restrictions on it that did not exist at the time Mr. Granat developed his moorage. In doing so, the City has found itself in a quandry. On the one hand, it wishes to discourage the reduction of open water by placement of housing on it. On the other hand, it wishes to continue to have houseboats inside the city limits.

The City has resolved this quandry by placing the burden of the problem on houseboat moorage owners. It has done so by enacting restrictive rent control legislation. Such legislation has been held to be constitutional by the Washington Supreme Court, *Jeffery v. McCullough*, 97 Wn. 2d 893, 652 P. 2d 9 (1982), but, at the same time, the Supreme Court has protected moorage owners' rights to remove themselves and their property from the controlled houseboat moorage market, *Granat v. Keasler*, 99 Wn. 2d 564, 663 P. 2d 830 (1983), *Kennedy v. Seattle*, 94 Wn. 2d 376, 617 P. 2d 713 (1980). If they moor their own houseboats on the property, they are not subject to control and can earn a greater return on the use of their moorage property.

Houseboat owners, on the other hand, have often purchased houseboats which only have month-to-month tenancies. Presumably, their purchase price should reflect

the fact that the houseboat has a right to remain at the moorage for only 30 days at a time. The City, by its eviction control provisions, has attempted to give the month-to-month tenants a perpetual lease at no cost. As the court observed in *Kennedy v. Seattle,* 94 Wn. 2d 376, 617 P. 2d 713 (1980), if the ordinance were constitutional, then, as long as the houseboat owner paid the rent and did not commit a nuisance, he would have a perpetual right to use the moorage.

The City has attempted to obtain a public benefit by imposing the burden of obtaining the benefit upon one small group of individuals, i. e., moorage owners. That is the essence of a taking of private property for public use without just compensation. *Armstrong v. United States,* 364 U. S. 40, 49 (1960). Furthermore, the City attempts to prohibit a moorage owner from placing his houseboat on the moorage while allowing the tenant to do so. It has rightly found that a tenant cannot be given a greater right to the use of property than that possessed by the landlord. The Washington Supreme Court correctly held the ordinance to be a taking of private property without just compensation.

The assumption underlying Mr. Keasler's position is that he has a constitutional right to have a houseboat moorage site in Seattle available for him in the event his moorage owner terminates his month-to-month tenancy. Mr. Keasler assumes he has this right by virtue of the United States Constitution and, therefore, he need not expend his own funds to purchase or develop another moorage site for his houseboat. Without this assumption, Mr. Keasler could not raise the constitutional issues presented in his Petition for Writ of Certiorari. It is Mr. Granat's

position that Keasler's assumption is utterly unsupportable.

DAMAGES FOR FILING FRIVOLOUS PETITION

Mr. Granat seeks an award of damages under the authority of Supreme Court Rule 49.2. That rule provides:

> When an appeal or petition for writ of certiorari is frivolous, the court may award the appellee or respondent appropriate damages.

This petition is frivolous. The court must deny it because of the independent state ground doctrine and because of the Petitioner's failure to raise the second issue before the court below. The law is clear on this point and it was clear at the time the Petition was filed. Keasler's argument that the Washington Constitution violates the United States Constitution is merely an attempt to circumvent the independent state ground doctrine, as well as an attempt to hide the fact that the second issue presented was not raised in the pleadings nor was it raised before the Washington Supreme Court. The petition is frivolous and damages should be awarded in an appropriate amount.

Mr. Granat proposes that the amount of $5,000.00 be awarded to recompense him for attorney fees incurred and delay caused in obtaining damages in the unlawful detainer action because of the filing of the petition, and also as a disincentive to the filing of any further frivolous petitions or appeals.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied and damages should be awarded to the Respondent because the Petition is frivolous.

Respectfully submitted,

OLWELL, BOYLE & HATTRUP

By: *HENRY LEE OLWELL
CLINTON H. HATTRUP
RODNEY T. HARMON

**Counsel of Record for Respondent*